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No. [redacted]

In the Supreme Court of the United States

OCTOBER TERM, 1967

DONALD SOMERVILLE and MARJORIE KULLERSTRAND,
Petitioners,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

On Petition For A Writ of Certiorari To The Appellate Court of Illinois, First Judicial District.

PETITION FOR A WRIT OF CERTIORARI

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Petitioners, Donald Somerville and Marjorie Kullerstrand, hereby petition this court for a writ of certiorari to review the judgment of the Appellate Court of Illinois, First Judicial District, which affirmed the judgment of conviction of theft entered against them by the Circuit Court of Cook County, County Department—Criminal Division.

Opinion Below

The opinion of the Appellate Court of Illinois is reported at 88 Ill.App.2d 212, 232 N.E. 2d 115, and is attached hereto as Appendix A *infra.*

Jurisdiction

The judgment sought to be reviewed was entered on October 16, 1967. A timely Petition for Leave to Appeal was denied by the Supreme Court of Illinois on Jan. 17, 1968. The statutory provision believed to confer on this court jurisdiction to review the judgment in question by writ of certiorari is Title 28, United States Code, Section 1257(3).

Question Presented For Review

Whether the Fifth Amendment prohibition against double jeopardy is applicable to the state and if so, were the petitioners unlawfully twice placed in jeopardy where after the jury was sworn to try the issues on a prior indictment for the same offense, the state moved for a mistrial on the grounds that the indictment was defective, the motion was granted over the objection of the petitioners and the state obtained the instant indictment upon which the petitioners were tried and convicted.

Constitutional Provisions and Statutes Involved

Constitution of the United States, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy for life or limb; * * *.

Criminal Code of 1961, Section 3—4 (Ill. Rev. Stat. (1967), Chap. 38, Sec. 3—4):

(a) A prosecution is barred if the defendant was formerly prosecuted for the same offense, based upon the same facts, if such former prosecution:

* * *

(3) was terminated improperly after the jury was impaneled and sworn or, in a trial before a court without a jury, after the first witness was sworn but before findings were rendered by the trier of facts, or after a plea of guilty was accepted by the court.

Statement of the Case

The petitioners were indicted by the grand jury of Cook County, Illinois, for the crime of theft, were found guilty by a jury and sentenced to the Illinois State Penitentiary for a term of not less than two nor more than ten years in the case of Donald Somerville, and placed on three years probation in the case of Marjorie Kullerstrand.

The indictment charged that on March 24, 1963, the defendant, Donald Somerville and Marjorie Kullerstrand committed the offense of theft in that they knowingly obtained unauthorized control over stolen property, to-wit: Thirteen Hundred Dollars in United States currency, the property of Zayre of Bridgeview, Inc., a corporation, knowing the said property to have been stolen by another, and intending to deprive said Zayre of Bridgeview, Inc., a corporation, permanently of the use and benefit of said property, in violation of Chapter 38, Section 16—1 (d) of the Illinois Revised Statutes, 1963.

The petitioners filed motions which were variously entitled, "Motion to Dismiss" in the case of Somerville and "Motion in the Nature of Double Jeopardy" in the case of Kullerstrand. (Ab. 2-3)

Somerville's Motion reads as follows:

> "1. That your petitioner had been indicted in March, 1964, indictment 64-916 for the crime of theft.
>
> 2. That on November 1, 1965, a jury was selected and sworn to try the issues in indictment 64-916; that on November 2, 1965, the State made a motion to nolle prosse said indictment which was sustained over the objection of your petitioner.

3. That subsequently your petitioner has been indicted for theft in indictment 65-3017.

4. That the only difference between indictment 64-916 and indictment 65-3017 is that the words 'intends to deprive the owner permanently of the use . . . property' have been added to the latter indictment

5. That under our present statute a person commits theft when he knowingly obtains or exerts unauthorized control of property of owner; Chapter 38, Section 16-1(a), Illinois Revised Statutes, 1963; that this is sufficient to charge a defendant with the crime of theft.

6. That it is not essential to constitute the crime of theft under present statute that the defendant intend to deprive the owner permanently of the use or benefiit of the property.

7. That the effect of former prosecution in indictment 64-916 is a bar to prosecution in indictment 65-3017 in accordance with the statute as set out in Chapter 38, Section 3—4(a)(2) and (3)(B)(3).

Wherefore your petitioner prays that he be discharged from the present indictment."

These motions were denied. (Ab. 3)

On appeal, the Appellate Court disposed of the petitioners' contention as follows:

"* * * In this court, the defendants urge:

1) That they were twice put in jeopardy for the same offense;

* * *

"Before us defendants argue that since the trial was commenced under the first indictment [64-916] and a jury impaneled and sworn, the defendants were thereby placed in jeopardy, and consequently the court must discharge them. In their brief defendants state:

> "Sec. 3—4 (a) (3), Chap. 38 states that 'A prosecution is barred if the defendant was formerly prosecuted for the same offense, based upon the same facts, if such former prosecution . . . (3) was terminated *improperly* after the jury was impaneled and sworn . . .'" [Emphasis added.]

"In order to have the statute apply, it is necessary that the first prosecution be terminated improperly. In the Notes in Smith-Hurd Annotated Statutes to the section in question, the statement is made:

> "The point at which jeopardy attaches in a jury trial is generally considered to be that at which, in a court of competent jurisdiction and upon a *valid indictment or information,* the defendant has been arraigned and has pleaded, and the jury has been impaneled and sworn." • • •

"Chapter 38, section 16-1, previous quoted in this opinion, states the requirements for an indictment or conviction of theft where the party obtains control over stolen property knowing the property to have been stolen by another. Under the rule laid down in *People* v. *Edge* and *People* v. *Harris, supra,* the first indictment was fatally defective and void. The court ruled properly in denying defendants' motion to discharge defendants at the time of the trial of the second indictment."

Reasons For Granting Writ

The question presented to this court embraces two subsidiary questions which are of great, if not extreme constitutional importance. The first of these subsidiary questions is whether the Fifth Amendment prohibition against double jeopardy is applicable to the states. Over thirty years has passed since the court examined the question in *Palko* v. *Connecticut,* 302 U.S. 319. In *Palko,* the court determined in the narrow context of the statute before it which permitted the state to appeal upon questions of law arising on the trial of criminal cases, that the prohibition against double jeopardy was not of the very essence of a scheme of ordered liberty nor was it a principle of justice so rooted in the tradition and conscience of our people as to be ranked as fundamental.

This conclusion was the result of a survey which still found the prohibition against self-incrimination not applicable to the states, nor the injunction against unreasonable search and seizures. Indeed, within a few years, the court would hold that the Sixth Amendment right to counsel was not applicable in every case. *Betts* v. *Brady,* 316 U.S. 455.

Since that time, *Mapp* v. *Ohio,* 367 U.S. 443, has extended the Fourth Amendment protections to state prosecutions; *Gideon* v. *Wainwright,* 372 U.S. 335, has extended the Sixth Amendment right to counsel to all state felony prosecutions; *Malloy* v. *Hogan,* 378 U.S. 1, extended the Fifth Amendment prohibition against self-incrimination to state proceedings and *Robinson* v. *California,* 370 U.S. 660, has made the Eighth Amendment prohibition against cruel and unusual punishments applicable to the states.

The time is now ripe for a re-examination of the question of whether the Fifth Amendment prohibition against double jeopardy is applicable to the states.

This brings us to the second question which is whether the prosecution may, after the jury has been selected and sworn, *nolle prosse* the case because of a claimed invalid indictment and retry the defendant.

In this respect, the opinion of the court below is in direct conflict with a controlling decision of this court.

The Appellate Court reasoned that because the first indictment for theft failed to contain an allegation that the defendants intended to deprive the owner permanently of the use of the property, it did not state all of the elements of the crime of theft and was, therefore, fatally defective.

The Court went on to rule:

> "Where the indictment or information is so defective in form or substance that it will not support a conviction, it cannot form the basis of proceedings which will put accused in jeopardy and bar another prosecution."

We submit that the indictment in this case, while defective in that it did not contain an element of the crime charged was not so defective as to deprive the trial court of jurisdiction in the absence of a motion by the defendant to dismiss. The indictment named the offense charged, stated most of the elements and properly alluded to the Code Section violated.

Regardless of the defect in the first indictment, it was constitutionally valid and could support a plea of former jeopardy. The courts of Illinois have consistently held that the purpose of the indictment is to notify the defendant

of the charge he had to meet and to enable him to prepare his defense. *People* v. *Burns,* 403 Ill. 407, 86 N.E.2d 197. The indictment in the first case certainly was sufficient to notify the defendants of the charges they had to meet and to enable them to prepare their defense. Thus, the indictment even if defective under the Criminal Code, could have supported the conviction of the defendants in the event that they waived the requirements of the Code that a charge must set forth the nature and elements of the offense.

This case is controlled by *United States* v. *Ball,* 163 U.S. 662. In that case, the defendant was indicted for the crime of murder. The indictment was defective in that it failed to aver either the time or the place of the death of the deceased. The defendant was tried and acquitted. Thereafter, the United States sought and obtained a new indictment charging him with the same murder. He was convicted. The Supreme Court of the United States reversed. This Court considered the English view that,

> "An acquittal upon an indictment so defective, that, if it had been objected to at the trial, or by motion in arrest of judgment, or by writ of error, it would not have supported any conviction or sentence has generally been considered insufficient to support a plea of former acquittal."

This Court rejected that view. It adopted a dissent by Justice Livingston, then of the New York Court of Appeals in *People* v. *Barrett,* 1 Johns. 66, in which he said,

> "This case, in short, presents the novel and unheard of spectacle, of a public officer whose business it was to frame a correct bill, openly alleging his own inaccuracy or neglect, as a reason for a second trial,

when it is not pretended that the merits were not fairly in issue on the first. That a party shall be deprived of the benefit of an acquittal by a jury on a suggestion of this kind, coming too from the officer who drew the indictment, seems not to comport with that universal and humane principle of criminal law, 'that no man shall be brought into danger more than once for the same offense.' It is very like permitting a party to take advantage of his own wrong. If this practice be tolerated, when are trials of the accused to end?" 163 U.S. 662, 667-668.

The Court then went on to say,

"After the full consideration which the importance of the question demands, [the English doctrine] appears to us to be unsatisfactory in the grounds on which it proceeds, as well as unjust in its operation upon those accused of crime; and the question being now for the first time presented to this court, we are unable to resist the conclusion that a general verdict of acquittal upon the issue of not guilty to an indictment undertaking to charge murder, and not objected to before the verdict is insufficient in that respect, is a bar to a second indictment for the same killing.

"The Constitution of the United States, in the Fifth Amendment, declares, 'Nor shall any person be subject to be twice put in jeopardy of life or limb.' * * * An acquittal before a court having no jurisdiction is, of course, like all the proceedings in the case, absolutely void, and therefore no bar to subsequent indictment and trial in a court which has jurisdiction of the offense. * * * But although the indictment was fatally defective, yet, if the court had jurisdiction of the cause and of the party, its judgment is not void, but only voidable by writ of error: and, until so voided, cannot be collaterally impeached. If the judgment is upon a verdict of guilty, and unreversed, it stands good, and warrants the punishment of the defendant accordingly and he could not be discharged by a writ

> of habeas corpus. * * * If the judgment is upon an acquittal, the defendant, indeed, will not seek to have it reversed; and the government cannot. * *.* But the fact that the judgment of the court having jurisdiction of the case is practically final affords no reason for allowing its validity and conclusiveness to be impugned in another case." 163 U.S. 662, 669-670.

The ruling in that case may be extended to the instant matter with little difficulty, although here the case did not go to verdict on the first indictment. The key words used by the Supreme Court of the United States are that the first indictment will support a plea of double jeopardy if it be, *"not objected to before the verdict as insufficient."* The defendants by objecting to the mistrial specifically waived any objection which they might have had to the first indictment. By waiving objection, the indictment would stand for all time as not objected to as insufficient. Thus even though the first trial did not go to verdict, the first indictment barred any subsequent prosecution.

The Appellate court in this case failed to distinguish between void convictions and voidable convictions, the distinction drawn by the Supreme Court of the United States in the *Ball* case.

A conviction under the first indictment would not have been void. It would have been merely voidable had the defendants raised the proper objection. In this case the defendant not only did not raise the proper objection but explicitly waived the objection. The provision of Section 114-1 of the Code of Criminal Procedure of 1963, to the effect that an objection to an indictment that it does not charge an offense is not waived by failure to raise it in a motion to dismiss prior to trial concerns itself only with the point in the proceedings at which such an objection may

be raised. The fact that such objection may be raised for the first time by motion in arrest of judgment or on appeal does not support an inference that the objection is one which can never be waived by explicit action of the defendant.

Because a conviction or acquittal on the first indictment would not have been void, the waiver of objection by the defendants to any defects in the indictment cured any such defects and the trial court should have permitted the first trial to proceed after the jury had been selected.

The defendants were placed in jeopardy. They were forced to undergo the considerable expense of two trials and were denied those rights which the prohibitions against double jeopardy were meant to preserve.

Conclusion

For the above and foregoing reasons a Writ of Certiorari ought to issue to review the judgment of the Appellate Court of Illinois, First Judicial District, entered in this case.

Respectfully submitted,

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